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August 23, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, DC 20554

RE: Oral and Written Ex Parte Presentations
ACS of Alaska, Inc., et al.
Petition to Amend Section 51.405 of the Commission's Rules
CC Docket No. 96-98

Dear Ms. Salas:

On behalf of General Communication, Inc. ("GCI"), we hereby report an oral ex parte presentation, made August 22, 2001, in the above referenced proceeding. Attending the meeting were Rick Hitz, Mark Moderow, and Martin Weinstein from GCI; John Nakahata from Harris, Wiltshire & Grannis; and Joe D. Edge and Tina Pidgeon from Drinker Biddle & Reath LLP, on behalf of GCI. The presentation was made to Dorothy Attwood, Chief, Common Carrier Bureau; Glenn Reynolds, Associate Bureau Chief, Common Carrier Bureau; Michelle Carey, Chief, Policy and Program Planning Division; Ann H. Stevens, Associate Division Chief, Policy and Program Planning Division, and Renee Crittendon, Attorney Advisor, Policy and Program Planning Division. In addition, Mr. Nakahata spoke with Deborah Weiner, Assistant General Counsel, Administrative Law Division. GCI's presentation is summarized in the attached documents, provided during the meeting.

In addition, GCI further notes that rural exemption issues have been raised or implicated in several pending court proceedings. See Telephone Utilities of Alaska, Inc.; Telephone Utilities of the Northland, Inc.; and PTI Communications of Alaska, Inc. v. Regulatory Commission of Alaska and General Communication Corp., Case Nos. 3AN-99-3494, 3AN-99-3499 consol. (Alaska Superior Court) (ACS appeal of rural exemption decision); ACS of Fairbanks, Inc., ACS of Alaska, Inc., and ACS of the Northland, Inc. v. GCI Communication Corp., d/b/a General Communication, Inc., and Regulatory Commission of Alaska, Case No. 3AN-00-03725-CI (Alaska Superior Court) (ACS appeal of Fairbanks and Juneau interconnection approval); and ACS of Fairbanks, Inc., ACS of Alaska, Inc., and ACS of the Northland, Inc. v. GCI Communication Corp., d/b/a General Communication, Inc., and Thompson, et al., Case No. A-00-288-CIV (JKS) (D. Alaska) (ACS appeal of Fairbanks and Juneau interconnection approval). To more fully

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explicate the federalism issues presented by these cases, GCI has attached its recent briefing of this issue.

Please address any questions regarding the foregoing to the undersigned.

Sincerely yours,

Tina M. Pidgeon

Enclosures

cc: Dorothy Attwood
Glenn Reynolds
Michelle Carey
Ann H. Stevens
Renee Crittendon
Deborah Weiner

TELECOMMUNICATIONS COMPETITION IN ALASKA
(Anchorage, Fairbanks & Juneau)

- ACS is the largest incumbent LEC in Alaska, serving approximately 360,000 lines in Anchorage, Fairbanks and Juneau, Alaska's three largest cities. ACS is the fourth largest ROR carrier in the country, after ALLTEL, Century and TDS.

- GCI Communication, Inc. is a CLEC authorized to serve, *inter alia*, Anchorage, Fairbanks and Juneau. GCI is today the only CLEC authorized to provide service to retail consumers in Juneau and Fairbanks, Alaska. GCI is actively planning and investing in the deployment of facilities in these markets, is a facilities-based carrier in Anchorage, will be a facilities-based carrier (UNE-L) in Fairbanks and Juneau, is certified as an ETC for Anchorage and has filed for ETC certification for Fairbanks and Juneau. GCI serves the entire local telecommunications market, including the residential mass market, in Anchorage, and intends to do so in Fairbanks and Juneau.

- Apart from Anchorage, Juneau (30,000 lines) and Fairbanks (40,000 lines) are the next two principal urban centers in Alaska. Juneau is the state capital.

- GCI entered Anchorage as a CLEC in 1997. Today, GCI serves 35% of the Anchorage local telecommunications market. Anchorage is among the most competitive markets in the United States.

- GCI first requested interconnection, access to unbundled network elements and collocation from ACS' predecessors in Fairbanks and Juneau in April 1997.

- The Alaska PUC terminated ACS' rural exemption for Fairbanks and Juneau in August 1999 (reaffirmed on reconsideration by the Regulatory Commission of Alaska, successor to the APUC, in October 1999). In October 2000, the Regulatory Commission of Alaska approved the ACS-GCI Interconnection Agreements covering Fairbanks and Juneau. GCI then commenced deploying facilities in Fairbanks and is actively engineering and coordinating the deployment of facilities in Juneau.

- GCI has installed a Lucent switch in Fairbanks in a brand new facility. Additionally, we are in the process of building collocation facilities in Fairbanks, which should be completed in the fourth quarter 2001. These are investments that GCI is making to offer competitive local exchange service that depend on access to the incumbent's unbundled loops.

- GCI initiated service in Fairbanks in May 2001. By July 2001, we were serving approximately 1500 access lines (approximately 4% of the market) in Fairbanks principally through wholesale arrangements under our Interconnection Agreement. Given the extreme dissatisfaction customers routinely express regarding the incumbent's service, GCI expects our market penetration to continue to climb, provided that ACS continues to perform under the ACS-GCI state-approved interconnection agreement.

- GCI has not yet initiated service in Juneau. In Juneau, however, we have ordered a Lucent switch and currently we are coordinating the placement of collocation facilities at two wire centers. These investments depend on access to the incumbent's loops. As long as ACS continues to perform under the ACS-GCI state-approved interconnection agreement, we anticipate launching service in Juneau by early first quarter 2002.

ACS Petition for Rulemaking on 251(f) Burden of Proof
Could Halt Facilities-Based Competition And Should Be Denied

- Consistent with the recommendations of the Regulatory Commission of Alaska, GCI asks that the FCC deny the ACS Petition without any declarations regarding the proper interpretation of 251(f). Doing otherwise could stymie competition in Alaska, and potentially other markets. In any event, ACS' petition could not be granted without full notice and comment rulemaking.

- ACS seeks to have the Commission grant it relief that Alaska state courts, exercising their authority to interpret applicable law, have refused to grant. There are no exigent circumstances compelling grant of the petition. ACS has not demonstrated that it will suffer irreparable harm if the status quo is preserved during the Alaska litigation. Indeed, Alaska state courts, up to and including the Alaska Supreme Court, have denied ACS' requests for a stay of its interconnection obligations in light of the 8th Circuit's second *Iowa Utility Board v. FCC* decision ("*Iowa II*").

- The only "on-the-ground" effect of granting the petition or otherwise opining on the interpretation of 251(f) at this time will be to give ACS a pretext unilaterally to refuse to perform under its state-approved interconnection agreement with GCI. ACS has attempted to do so in the past, including in January 2001, immediately following the Supreme Court's denial of certiorari of the *Iowa II* decision. Such a result is not in the public interest, nor does it further the "pro-competitive, de-regulatory" objectives of the 1996 Act.

- Nothing in *Iowa II* mandate requires that the FCC issue a national rule such as requested by ACS. Although *Iowa II* vacated rule 51.405, it does not require that the FCC promulgate a new rule. Whether to promulgation a new rule or to proceed through ad hoc litigation is a matter within the "informed discretion" of the FCC. *SEC v. Chenery*, 332 U.S. 194 (1947). Nothing in the FCC's 1996 Local Competition Order requires issuance of a rule.

- As a matter of law, it is only the 8th Circuit's judgment, vacating rule 51.405 that is binding on courts. The 8th Circuit's (incorrect) legal reasoning is not the "law of the land." Although the 8th Circuit decision is persuasive precedent, it is not binding on state supreme courts (and therefore inferior state courts), even for states within the geographic boundaries of the 8th Circuit. Like other states, the Alaska Supreme Court has held that Alaska courts are not bound by federal circuit court interpretations of law. *See Totemoff v.State*, 905 P.2d 954, 963 (Alaska 1995). Until the U.S. Supreme Court rules to the contrary, state courts may not agree with the 8th Circuit's conclusion about the Act's plain meaning, particularly in light of the FCC's arguments in support of certiorari.

- The issue of the appropriate interpretation of 251(f) with respect to the assignment of the burden of proof is being fully litigated in the Alaska courts. Following *Iowa II,* ACS filed a Motion To Vacate the RCA's rural exemption decision with the Alaska Superior Court, arguing that the Alaska State Courts are bound to follow the Eighth Circuit's interpretation of the 1996 Act on the burden of proof issue. On May 16, 2001, the Court denied the motion from the bench.

- As expressly stated in its filings, ACS' main objection is that it must now begin unbundling loops and providing collocation. This is not sufficient reason for the FCC to take any action that ACS could use to disturb the Alaska State Court rulings and stop competition from proceeding in Juneau and Fairbanks.

ACS
Alaska Communications Systems

January 31, 2001

Via Regular Mail and Facsimile 265-5676

Mr. Mark Moderow
Corporate Counsel
GCI Communications Corp.
2550 Denali Street, Suite 1000
Anchorage, AK 99503

RE: 3AN-99-3499 Rural Exemption Appeal

Dear Mark:

The Eighth Circuit Court of Appeal's July 18, 2000 ruling and the U.S. Supreme Court's January 22, 2001 denial of GCI's petition for certiorari on the rural exemption issue leaves no doubt that the RCA incorrectly terminated the rural exemptions of the three ACS rural companies. ACS-F, ACS-AK and ACS-N therefore filed a Motion for Immediate Stay with the Alaska Superior Court yesterday.

Given the ACS rural companies' extremely high probability of success in securing the stay, and, ultimately, other relief, it is in the best interests of both GCI and the ACS rural companies to halt any work undertaken as a result of the RCA's improper termination of the rural exemptions. In order to prevent any further wasted effort and expense by any of the parties, the ACS rural companies are suspending any work of this nature until the Alaska Superior Court rules on the Motion for Immediate Stay.

Of course, this suspension does not include work required to facilitate GCI's entry into the rural markets through any other allowable means.

Additionally, if GCI is concerned about the length of time it may take for the Court to rule (which ACS does not believe will be substantial), the ACS rural companies would consider joining a stipulated motion or request to the Court for either an emergency ruling or a ruling by a date certain.

Sincerely,

S. Lynn Erwin
Attorney for ACS of Fairbanks, Inc;
ACS of Alaska, Inc. and
ACS of the Northland, Inc.

510 L Street, Suite 500 Anchorage, Alaska 99501 tel 907.297.3000 fax 907.297.3153 www.acsalaska.com

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

TELEPHONE UTILITIES OF ALASKA, INC.; TELEPHONE UTILITIES OF THE NORTHLAND, INC.; and, PTI COMMUNICATIONS OF ALASKA, INC. Appellants, vs. REGULATORY COMMISSION OF ALASKA and STATE OF ALASKA, Appellee, and GENERAL COMMUNICATION CORP. Additional Appellee.	)	Case Nos. 3AN-99-3494 3AN-99-3499 (Consolidated)
GCI COMMUNICATION CORP., Appellant, vs. ALASKA PUBLIC UTILITIES COMMISSION, et al. Appellees.	)	Case Nos. 3AN-98-4759 3AN-98-4903 3AN-98-4905 (Consolidated)

GCI'S OPPOSITION TO ACS' MOTION TO VACATE

Martin M. Weinstein, ABA No. 9306051
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Facsimile: 907-265-5676

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INTRODUCTION

GCI Communication Corp. d/b/a GCI (" GCI") hereby opposes ACS'[1] motion to vacate the Court's March 4, 1999 Decision And Order[2] and the Regulatory Commission of Alaska's (" RCA") Order dated October 11, 1999 terminating the rural exemption of ACS' subsidiaries in Juneau and Fairbanks (" Termination Order") pursuant to 47 U.S.C. § 251(f)(1).[3] The legal arguments in this motion are substantially the same as the arguments ACS presented in support of its ACS' Motion For An Immediate Stay, which the Court rejected when it denied the stay on February 9, 2001.

Procedurally, this motion is unusual. Save for GCI's motion to strike, which is still pending with the Court for decision, and oral argument, the case is ready for a decision.[4] Rather than allow the appeal to run its normal course, however, ACS has filed the instant motion asking for

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[1] Alaska Communications System, Inc. and its subsidiaries shall be referred to collectively as " ACS" in this pleading.

[2] The Court's March 4, 1999 Decision and Order is attached as Exh. 5 to GCI's Opposition to ACS' Motion For Stay dated February 6, 2001.

[3] The RCA's Termination Order is attached as Exh. 1 to GCI's Opposition To ACS Motion For Stay dated February 6, 2001.

[4] In the Motion To Strike, GCI requested an opportunity to provide supplemental briefing to the Court regarding the new arguments that ACS included in its Reply Brief about the Eighth Circuit decision in *Iowa Util. Board v. FCC*, 219 F.3d 744 (8th Cir. 2000) (" *Iowa II*"). GCI's request for supplemental briefing is now moot in view of

a summary disposition of the case based on the Eighth Circuit's decision in *Iowa II*.

In the present motion, ACS again argues that the RCA's Termination Order must be vacated in view of the Eighth Circuit's decision in *Iowa II*. ACS also argues that the Court must vacate its prior burden of proof ruling for the same reason. ACS' argument rests principally on the proposition that the Eighth Circuit's interpretation of Sec. 251(f)(1) with respect to the burden of proof issue absolutely binds the Alaska Courts and the RCA. Moreover, ACS argues that the RCA's limited reference to the FCC's undue economic burden rule, which was in effect at the time of the RCA decision, undermines the validity of the RCA's Termination Order. These arguments should be familiar to the Court because they are same ones that it rejected when it denied the stay.

There are a few new arguments, however, that ACS has added to the present motion.[5] ACS now attempts to persuade the Court that the Eighth Circuit's "plain meaning" interpretation of Sec. 251(f)(1) should be followed because it is persuasive. This Court, however, has twice interpreted Sec. 251(f)(1) differently than the Eighth Circuit. The first time occurred when Judge Murhpy held that Sec. 251(f)(1) is silent regarding which party bears the burden of proof and then assigned the burden to ACS

under state law based on the principle that the party in possession of the relevant information should bear the burden. Exh. 5 at 5-6, attached to GCI's Opposition to Stay. More recently, this Court held that the Eighth Circuit's interpretation is "unpersuasive" when it denied the stay. Court's February 9, 2001 Order. As discussed below, ACS does not offer anything new that should convince the Court that its prior interpretations of Sec. 251(f)(1) are wrong.

Additionally, ACS now argues that GCI should be collaterally and judicially estopped from arguing that the Eighth Circuit's interpretation of Sec. 251(f)(1) does not bind the Alaska Courts and the RCA. These new arguments are based on GCI's participation in the *Iowa Utilities Board* litigation and the petition for certiorari it filed with the U.S. Supreme Court. For the reasons discussed below, application of the collateral estoppel doctrine in the circumstances of this case would be inappropriate, unfair and contrary to the public interest. Moreover, GCI has not taken any inconsistent positions before the U.S. Supreme Court that would justify application of the judicial estoppel doctrine.

In short, there is nothing new in this motion that justifies vacating the RCA's Termination Order and the Court's prior burden of proof ruling. For the same reasons that the Court denied ACS' request for an immediate stay, it

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[5] In this "second-bite of the apple," ACS is relitigating the same issues but including arguments that it wished it

should likewise deny ACS' motion to vacate, which is more drastic and extreme than the prior motion for a stay. The Court should allow full local exchange competition to proceed in Juneau and Fairbanks in accordance with the RCA's lawful orders and Congress' goal under the 1996 Telecommunications Act ("1996 Act")[6] to promote competition for all citizens.

BACKGROUND

I. PROCEDURAL HISTORY OF THIS CASE

A. THE TELECOMMUNICATIONS ACT OF 1996 AND THE RURAL EXEMPTION PROCEEDING

This case concerns the RCA's decision to lift the rural exemption of ACS' subsidiaries in and around the areas of Juneau and Fairbanks pursuant to Sec. 251(f)(1). The lifting of the rural exemption allows competitors, like GCI, to negotiate and arbitrate the purchase of services and functions under 47 U.S.C. §251(c) ("Sec. 251(c)") from incumbent local exchange carriers ("ILEC"), like ACS. With the passage of the 1996 Act, Congress fundamentally restructured local telephone markets by mandating the removal of barriers to competitive entry and forcing the ILECs to open their networks to competition. *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 371 (1999). The obligations imposed on ILECs under Sec. 251(c) are critical and lie at the heart of this administrative appeal. Without services and network functions from ACS under Sec. 251(c), GCI cannot

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had made the first time.

provide full local exchange competition to the vast majority of citizens in Juneau and Fairbanks.

At pages 10-11 of its Motion To Vacate, ACS tries to persuade the Court that GCI could still compete effectively in Juneau and Fairbanks without interconnection services and functions from ACS under Sec. 251(c). Congress, however, did not intend that competitors would have to build duplicate networks (lines, poles, etc.) in order to compete. To the contrary, through Sec. 251(c), Congress intended that ILEC's open and share their "bottle-neck" facilities with competitors. ACS' argument that competition can proceed without Sec. 251(c) interconnection services is contrary to the substantial evidence that exists in the administrative record (testimony from GCI's expert and the Staff Advocacy's expert) that effective competition cannot proceed without such services and functions. Moreover, ACS' argument is contrary to the RCA's finding that "granting GCI's petition for termination of the rural exemption in this case opening PTI's study areas to local competition is an important step towards that goal [i.e., implementing competition]." Termination Order at 22. Furthermore, it is contrary to the FCC's finding that:

> We also note that many new entrants will not have fully constructed their local networks when they begin to offer service. Although they may provide some of their own facilities, these new entrants will be unable to reach all of their customers without depending on the incumbent's facilities. Hence, in

[6] Pub. L. 104-104, 110 Stat. 56.

> addition to an arrangement for terminating traffic on the incumbent LEC's network, entrants will likely need agreements that enable them to obtain wholesale prices for services they wish to sell at retail and to use at least some portions of the incumbents' facilities, such as local loops and end office switching facilities.

FCC 96-325 Local Competition First Report and Order, 11 FCC Rcd 15499 at ¶ 14 (1996).

To be clear, if the Court grants ACS Motion To Vacate, GCI cannot effectively compete to offer full local exchange service to the vast majority of citizens in Juneau and Fairbanks. Effective competition in the local exchange markets in Juneau and Fairbanks will not occur.

Telephone companies that meet the definition of a "rural telephone company" in 47 U.S.C. §153(47) are exempt from Sec. 251(c) obligations until they receive a bona fide request for Sec. 251(c) services from a competitor, and the state commission decides whether to terminate the exemption pursuant to Sec. 251(f)(1). In Alaska, Anchorage is the only city that is not "rural" under the federal definition. GCI filed its bona fide request for services and request for termination of the rural exemption of the ACS subsidiaries (which were then owned by PTI) in Juneau and Fairbanks with the former Alaska Public Utilities Commission ("APUC") on September 10, 1997.

The APUC initially assigned the burden of proof to GCI to prove the conditions in Sec. 251(f)(1) for the lifting of the rural exemption and ultimately denied GCI's

petition. On March 4, 1999, however, the Superior Court (Judge Murphy sitting *Pro Tem)* vacated the APUC decision. The Superior Court held that the Act "does not expressly assign the burden of proof in determining whether a §251(f)(1) exemption should be terminated." Exh. 5 at 5, attached to GCI's Opposition To ACS' Motion For Immediate Stay. The Court held as a matter of state law that ACS should bear the burden of proving the conditions for continuing the rural exemption since they possess and control the information necessary to make a determination under Sec. 251(f)(1). *Id.* The Court remanded the case to the APUC for a new hearing with the burden of proof on ACS.

On March 22, 1999, ACS then moved for a stay of the remand hearing pending the disposition of a Petition For Review it would file with the Alaska Supreme Court. On April 9, 1999, Judge Murphy denied the stay. Exh. 6, attached to GCI's Opposition To ACS Motion For Immediate Stay. ACS then filed a petition for review and motion for stay with the Alaska Supreme Court on April 16, 1999, and the Court denied the petition for review on April 23, 1999.

On remand, the APUC terminated the rural exemption of ACS on June 30, 1999. After the RCA assumed control of utility regulation in the state, it re-affirmed the decision to terminate the rural exemption. Exh. 1, attached to GCI Opposition To ACS Motion For Immediate Stay. The RCA's Termination Order is the subject of ACS' administrative appeal, which ACS now seeks to immediately vacate.

Following the RCA's Termination Order, GCI and ACS arbitrated an interconnection agreement, which the RCA approved on October 5, 2000.[7] The interconnection agreement sets forth the terms and conditions for services and network functions that GCI needs to begin offering full local exchange service in Juneau and Fairbanks. The RCA, its staff, and the parties have expended considerable time and money in the arbitration process. *See* Affidavit of Phil Treuer at 9-10, attached to the RCA's Opposition to ACS Motion To Vacate. Through four years of protracted litigation, ACS successfully has preserved its monopoly in Juneau and Fairbanks. Now, just as GCI is planning to enter the Juneau and Fairbanks markets, ACS seeks to halt and delay competition yet again.

B. IOWA UTIL. BOARD LITIGATION

While this case was being heard at the RCA and reviewed by State Courts, as just described, the *Iowa Util. Bd.* litigation was proceeding through the Federal Courts. The history of the *Iowa Util. Bd.* litigation unfortunately has caused considerable confusion across the country for the state commissions and the telecommunications industry as they have endeavored to implement local competition in

[7] ACS has filed two lawsuits challenging the RCA's approval of these interconnection agreements: one in state court, and another in federal court. In the federal court action, ACS filed a motion for an injunction on March 14, 2001 with Judge Holland requesting that he enjoin implementation of the GCI-ACS Interconnection Agreement based, in part, on the arguments regarding the RCA's Termination Order that are before this Court and the Alaska Supreme Court.

accordance with the FCC's rules since the passage of the 1996 Act.

Following the passage of the 1996 Act, the FCC promulgated rules to guide state commissions in their implementation of local competition. A number of challenges to the FCC's rules were filed in several circuits. These were consolidated and assigned to the Eighth Circuit in accordance with federal multi-district rules. The Eighth Circuit is the sole forum that has jurisdiction to review the FCC's local competition rules. 28 U.S.C. § 2342(1) (the "Hobbs Act") and 47 U.S.C. §402(a).

In 1997, the Eighth Circuit vacated many of the FCC's competition rules on the ground that the FCC lacked jurisdiction to adopt the rules. *Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). The U.S. Supreme Court, however, subsequently reversed the Eighth Circuit's decision in this regard. *AT&T Corp., supra*. The case was remanded to the Eighth Circuit to consider the substantive challenges to the FCC rules. In *Iowa II*, the Eighth Circuit again has invalidated many of the FCC's competition rules. Of relevance to this case, the Eighth Circuit vacated an FCC rule that assigned the burden of proof to the ILEC in a Sec. 251(f)(1) proceeding, and another rule that interprets undue economic burden to exclude the burdens associated with efficient, competitive entry. *Iowa II*, 219 F.3d at 760-62.

The U.S. Supreme Court recently granted certiorari to consider three issues based on *Iowa II*. The Supreme Court declined to consider the Eighth Circuit's decision on the FCC's rural exemption rules. *FCC v. Iowa Util. Bd.*, 2001 WL 46229 (January 22, 2001).

C. ACS' REQUEST FOR A STAY AND ITS PETITION FOR REVIEW IN THE ALASKA SUPREME COURT

Following the U.S. Supreme Court's denial of certiorari on the rural exemption rules, ACS filed its motion with this Court requesting an immediate stay of the RCA's Termination Order. As discussed in the Introduction, ACS argued that the Alaska Courts are now bound to follow the Eighth Circuit's interpretation of Sec. 251(f)(1) on the burden of proof issue. Moreover, ACS previously argued that the RCA's Termination Order is defective because the RCA referred to the FCC's undue economic burden rule, which was in effect at the time of the RCA's decision.

This Court rejected both of these arguments and held that *Iowa II* "does not require a stay, nor is it persuasive of the merits of a stay." Order dated February 9, 2001. Following the denial of the stay, ACS filed a Petition For Review with the Alaska Supreme Court to reverse this Court's order. As the Court knows, this matter is pending with the Alaska Supreme Court for decision.

LEGAL STANDARD OF REVIEW

As discussed above, the Court has already interpreted Sec. 251(f)(1) and its interpretation is the law of the case. Indeed, the parties and the RCA expended considerable time and effort following this Court's remand instructions. In its Motion To Vacate, ACS now seeks to convince the Court that its prior ruling was in error. While the Court has the power to reverse its prior interpretation of Sec. 251(f)(1) based on *Iowa II*, it should do so only if it is firmly convinced that its prior interpretation is wrong. *West v. Buchanan*, 981 P.2d 1065, 1067 (Alaska 1999). GCI submits that this threshold should be difficult to meet considering that the Court just recently held that the Eighth Circuit's interpretation is "unpersuasive." February 9, 2001 Order.

With respect to the RCA's limited reference to the FCC's now vacated undue economic burden rule, GCI submits that the Court should not vacate the RCA's Termination Order unless it is firmly convinced that the RCA's limited reference clearly renders the RCA's consideration of economic harm at the remand hearing invalid. As argued below, GCI believes that the RCA fully considered but completely rejected all of ACS' economic harm arguments at the remand hearing, and therefore, the RCA's limited reference to the now vacated FCC rule is, at most, harmless error.

ARGUMENT

I. THE ALASKA COURTS ARE NOT REQUIRED TO BLINDLY FOLLOW THE EIGHTH CIRCUIT'S INTERPRETATION OF SEC. 251(f)(1)

ACS again argues that the Eighth Circuit's interpretation of Sec. 251(f)(1) on the burden of proof issue binds this Court and the RCA. ACS Motion To Vacate at 12-21. ACS' argument on this issue perhaps is more strident than when it made the same argument in support of its motion for an immediate stay, but it otherwise is substantially the same. The Alaska Supreme Court's precedents, however, make it abundantly clear that the U.S. Circuit Courts' interpretation of a federal statute do not bind the Alaska Courts.

A. THE ALASKA COURTS ARE BOUND ONLY BY THE U.S. SUPREME COURT ON FEDERAL QUESTIONS OF LAW

Previously, in its motion for stay, ACS failed to even address the Alaska Supreme Court's pronouncements that the Alaska Courts are not bound by the interpretations of federal law by the federal circuits. *See Totemoff v. State*, 905 P.2d 954, 963 (Alaska 1995)(holding that the Ninth Circuit's interpretation of ANILCA does not bind the Alaska Courts); *In Re: F.P. W.M. and A.M.*, 843 P.2d 1214, 1219 n.1 (Alaska 1992) (holding that the Ninth Circuit's interpretation of the Indian Child Welfare Act and Public Law 280 does not bind the Alaska Courts). The Alaska Supreme Court has cited approvingly to the Alaska Court of Appeals' summation of this proposition, which is:

> Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court.

Re: F.P. W.M., 843 at 1219 n.1.[8]

In its Motion To Vacate, ACS now attempts to distinguish these cases stating that the "controlling distinction" is that they did not involve a situation where one Circuit Court of Appeals speaks for all of the Circuit Courts and a split among the circuit courts allegedly cannot exist. ACS Motion To Vacate at 16-17. ACS is referring to the Eighth Circuit's exclusive jurisdiction to determine the validity of the FCC's rules under the Hobbs Act and the federal multi-district rules. ACS, however, completely misses the point. It does not matter that the Eighth Circuit speaks for the Ninth Circuit because even the Ninth Circuit's interpretation of a federal statute does not bind the Alaska Courts in accordance with the Alaska Supreme Court's precedents.[9]

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[8] The Alaska Supreme Court's pronouncements are not unusual. Other state courts have decided similarly that on federal questions of law, they are bound only by the decisions of the U.S. Supreme Court. These courts treat lower federal court decisions as merely persuasive or not persuasive precedent depending on the logic of the decision. *See, e.g., In Re: Tyrell*, 876 P.2d 519, 524 (Cal. 1994); *People v. Brisbon*, 544 N.E.2d 297, 308 (Ill. 1989); *State v. Strickland*, 683 So.2d 218, 230 (La. 1996); *Lamb v. Railway Express Agency*, 320 P.2d 644, 646 (Wash. 1958).

[9] The Eighth Circuit's holding regarding the validity of the FCC rules binds all courts, but its interpretation of the 1996 Act does not bind a court that is not determining the validity of an FCC rule. *See, e.g., U.S. West Comm. V. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999) (upholding a combinations requirement in an interconnection agreement notwithstanding Eighth Circuit's decision to

Moreover, the U.S. Supreme Court's denial of certiorari with respect to the Eighth Circuit's decision to vacate the FCC's rural exemption rules is not in any way a substantive decision on the merits of the Eighth Circuit's interpretation of Sec. 251(f)(1). *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995). Absent an interpretation by the U.S. Supreme Court, the Alaska Courts are not bound to follow the Eighth Circuit's interpretation of Sec. 251(f)(1), particularly when this Court has twice interpreted the statute differently.

B. THE EIGHTH CIRCUIT'S INTERPRETATION DOES NOT BIND THE ALASKA COURTS UNDER 28 U.S.C. §2342

The principal premise underlying ACS' argument that the Alaska Courts are bound to follow the Eighth Circuit's interpretation of Sec. 251(f)(1) is its assertion that this Court's independent interpretation would violate the Hobbs Act. The Hobbs Act vests the federal court of appeals (other than the Federal Circuit) with exclusive jurisdiction to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the FCC's rules and final orders. 28 U.S.C. §2342(1). As explained above, through the federal multi-district panel rules, the Eighth Circuit is the sole forum that has jurisdiction to review the FCC's local competition rules.

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vacate FCC combinations rule). In view of this split between the Ninth and Eighth Circuits, which ACS claims cannot occur, this is one of the issues the U.S. Supreme Court has agreed to review. *See FCC*, 2001 WL 46229. *See* Hobbs Act discussion below.

The present case, however, does not in any way threaten to "enjoin, set aside, suspend (in whole or in part), or [to] determine the validity of" the FCC's rules. For purposes of this case, the FCC's burden of proof and undue economic rules are vacated in accordance with *Iowa II*. There is no question about this fact. In the absence of these rules, the Alaska Courts have the jurisdiction and an independent duty to establish a burden of proof rule in accordance with its own interpretation of the 1996 Act. Such action is not a "collateral attack" on the Eighth Circuit's exclusive jurisdiction to determine the validity of the FCC's competition rules. While the Eighth Circuit's decision to vacate the FCC rules is immune under the Hobbs Act, its interpretation of the 1996 Act in cases not involving a challenge or determination of the FCC rules is not immune.

None of the cases ACS cites at 12-22 in its Motion To Vacate holds that the Hobbs Act requires all courts across the country to follow the Circuit Court's underlying reasoning for vacating a rule or order of one of the enumerated agencies. The Hobbs Act vests exclusive jurisdiction in the Circuit Courts to review the rules and orders of the agencies listed under the Act; it does not vest the Circuit Courts with exclusive jurisdiction to interpret federal statutes.

The seminal case on the issue of collateral attacks to the exclusive jurisdiction of the Courts of Appeal under

the Hobbs Act is *FCC v. ITT World Comm, Inc.*, 466 U.S. 463 (1984). ACS, too, relies on this case. ACS Motion To Vacate at 15, Notes 36-38. In *ITT World Comm.*, the Supreme Court held that the district court lacked jurisdiction to enjoin the FCC from taking action consistent with a prior FCC decision. The Court held that parties could not evade the Courts of Appeals' exclusive jurisdiction to review the FCC's rules by requesting an injunction in the district court. *Id.* at 468-69. The present case, however, is not an injunction proceeding against the FCC. The FCC is not even a party to this case. This Court's independent interpretation of Sec. 251(f) does not run afoul of the concerns the Supreme Court expressed in *FCC v. ITT World Comm.*

In *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996), which ACS cites in Note 36 of its Motion, the FCC had issued an order reserving exclusive jurisdiction over certain complaints concerning political advertising. In view of this order, the Ninth Circuit held that if the district court had maintained jurisdiction over plaintiff's complaints, it would have required the district court to "enjoin, set aside, or determine the validity of the [FCC's] Declaratory Ruling." *Id.* *Wilson* illustrates perfectly the circumstances that would give rise to a Hobbs Act problem. By contrast, in this case, the Alaska Courts are not being asked to enjoin, set aside or determine the validity of the FCC's rules. There is no Hobbs Act violation.

ACS also cites *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) at page 15, Note 35 of its Motion To Vacate, but this case again illustrates why this Court is not barred under the Hobbs Act from independently interpreting Sec. 251(f)(1). In *Moser*, the Ninth Circuit rejected the FCC's argument that the district court lacked jurisdiction under the Hobbs Act to review the Appellees' challenge to the constitutionality of a provision of the Telephone Consumer Protection Act. The Court upheld the district court's jurisdiction because the Appellees were not asking the district court to review the FCC's regulations, only the constitutionality of the statute. *Id.*

In our case, neither GCI nor the RCA is asking this Court to review the FCC's rules, and hence in accordance with *Moser*, this Court has jurisdiction to independently interpret the 1996 Act in the absence of binding FCC rules.

ACS also relies on *Nebraska PSC v. Aliant Midwest*, 619 N.W.2d 809 (Neb. 2000). ACS Motion To Vacate at 19. In *Aliant Midwest*, the Supreme Court of Nebraska upheld the Nebraska Public Service Commission's determination that U.S. West, the incumbent ILEC, was required to provide unbundled subloops at "cost-based" rates. The Nebraska Supreme Court cited approvingly to *Iowa II* to support the proposition that the Nebraska Commission has authority to

set just and reasonable "cost-based" rates. 619 N.W.2d at 819. The Court, however, did not address the Hobbs Act. The Nebraska Supreme Court's decision does not advance ACS' argument that the Hobbs Act bars the Alaska Courts from independently interpreting the 1996 Act in the absence of an FCC rule vacated by the Eighth Circuit.

ACS does not even acknowledge the Ninth Circuit's disagreement and split with the Eighth Circuit on whether requiring ILECs to combine network elements for competitors is consistent with the 1996 Act. *See* Note 9 above. The Eighth Circuit had vacated an FCC rule requiring such combinations. Yet, the Ninth Circuit approved this requirement in an interconnection agreement. *U.S. West Comm.*, 193 F.3d at 1121. If ACS' interpretation of the Hobbs Act were correct, procedurally, the Ninth Circuit never could have disagreed with the Eighth Circuit on whether a combinations requirement is consistent with the 1996 Act.

ACS suggests that GCI has incorrectly interpreted this case. It claims in a footnote that "the Ninth Circuit was reviewing state law that appeared to be inconsistent with the Eighth Circuit's invalidation of similar FCC regulation (in *Iowa Utilities I*), but which was consistent with the Supreme Court's interpretation of the Act." ACS Motion To Vacate at 19, Note 47. ACS has it wrong. In *U.S. West*, the Washington Utilities and Transportation Commission approved a term in an interconnection agreement that

required the ILEC to combine network elements with other elements from the ILEC's network or possessed by the CLEC. *U.S. West*, 193 F.3d at 1121, Note 7. The ILEC (U.S. West) argued that the Eighth Circuit invalidated the FCC's rule imposing this combinations requirement on ILECs, and therefore the Eighth Circuit's interpretation of law "requires this court [the Ninth Circuit] to conclude that the MFS combination provision violates the Act." *Id.* at 1121.

As explained above, the Ninth Circuit disagreed. It relied on the Supreme Court's reasoning for upholding a different FCC rule [a rule that prohibits the ILEC from separating already-combined elements before leasing] and affirmed the Washington Commission's approval of a combinations requirement. The point is that the Ninth Circuit did not feel bound to follow the Eighth Circuit's reasoning for vacating the FCC's combination rule. If ACS' interpretation of the Hobbs Act were correct, then the Ninth Circuit would have been required to blindly follow the Eighth Circuit's interpretation notwithstanding the reasoning of the U.S. Supreme Court on a different but similar FCC rule.

In short, ACS' argument that the Alaska Courts are bound by the Eighth Circuit's interpretation of Sec. 251(f)(1) is flatly wrong. Contrary to ACS' protests and pleas for national uniformity in rural exemption proceedings, it is neither surprising nor unusual in our

system of government for various courts in various states to differ on an interpretation of a federal statute until the U.S. Supreme Court addresses the issue. Furthermore, the FCC is not bound to issue a new burden of proof rule to replace the rule vacated by the Eighth Circuit as ACS suggests at page 21 of its Motion To Vacate. The FCC clearly can decide to allow state commissions and the state courts to determine the procedural rules applicable in a rural exemption proceeding. In fact, the FCC generally has offered little guidance to state commissions on procedures (*e.g.*, the FCC has not offered any guidance on what is a *bona fide* request for services, which is the trigger for a rural exemption proceeding) in proceedings that fall within their jurisdiction under the 1996 Act.

C. THE EIGHTH CIRCUIT'S INTERPRETATION OF SEC. 251(f)(1) IS NOT PERSUASIVE

For the first time, ACS argues that the Eighth Circuit's interpretation of Sec. 251(f)(1) in *Iowa Util. Bd. II* is reasonable and should be followed for the logic of its reasoning. It is not surprising that ACS has avoided trying to defend the Eighth Circuit's truly remarkable "plain meaning" interpretation of Sec. 251(f)(1). This "plain meaning" interpretation is contrary to the U.S. Supreme Court's general observation that "[i]t would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity.

It is in many respects a model of ambiguity or indeed even self-contradiction." *AT&T Corp.*, 525 U.S. at 397.

Moreover, ACS' defense of the Eighth Circuit's interpretation of Sec. 251(f)(1) is directly contrary to this Court's interpretation. This Court, by two different judges; twice has interpreted Sec. 251(f)(1) differently than the Eighth Circuit. The first time occurred when Judge Murphy held that the 1996 Act is silent concerning which party should bear the burden of proof in a Sec. 251 proceeding and then assigned the burden to ACS as a matter of state law. The second time occurred when this Court denied the stay and held that the Eighth Circuit's interpretation is "unpersuasive." GCI submits that the Eighth Circuit's interpretation of Sec. 251(f)(1) is not persuasive and that ACS does not offer any compelling reason why this Court should now depart from its prior interpretations of Sec. 251(f)(1).

In *Iowa II*, the Eighth Circuit held that the plain language in Sec. 251(f)(1) requires that the burden of proof be assigned to the CLEC. It reached this conclusion based on the word "until" in Sec. 251(f)(1)(A) and the word "terminate" in Sec. 251(f)(1)(B). The Court explained that because the statute permits the rural exemption to continue "until" a bona fide request for services is made, and that the exemption shall "terminate" when the statutory criteria

are met, the "plain meaning" of the statute clearly places the burden of proof on the CLEC. *Iowa II*, 219 F.3d at 762. Contrary to the Eighth Circuit's interpretation, there is nothing about the words "until" and "terminate" in Sec. 251(f)(1) that compel the conclusion that Congress plainly decided to assign the burden of proof to one party or the other in a rural exemption proceeding. The only "plain meaning" that can be gleaned from these terms is that the rural exemption continues until it is lifted. The statute on its face does not clearly assign the burden of proof to one party or another. If Congress had wanted to clearly assign the burden of proof in Sec. 251(f)(1), it could have said so with a simple declaration like "the burden of proof shall be on the petitioner" or words to that effect.

When this Court (Judge Murphy) interpreted the statute prior to *Iowa II* it concluded that the "Act does not expressly assign the burden of proof in determining whether a §251(f)(1) exemption should be terminated." Exh. 5 at 5, Attached to GCI Opposition to ACS Motion For Immediate Stay. Based on this interpretation, the Court assigned the burden of proof to ACS as a matter of state law in accordance with the basic principle of fairness that the party in control of the relevant facts relating to the statutory criteria in Sec. 251(f)(1) should bear the

burden. *Id.* at 5-6. The Court rejected the argument that the burden of proof must be on the party seeking to change the status quo, which ACS re-argues today. The Court's prior decision was sound and fair. There is no compelling reason today to reverse this Court's prior decision.

ACS also argues that the Court should reverse its prior interpretation because the FCC promulgated a rule requiring companies with fewer than 2% of the nation's lines to prove the requirements under Sec. 251(f)(2) for a modification of their interconnection obligations under Sec. 251(c). ACS reasons that the FCC's decision to place the burden of proof on ILECs in both Sec. 251(f)(1) and (f)(2) fails to distinguish between the rural companies that have an exemption in (f)(1) and the 2% companies that do not have an exemption in (f)(2). ACS Motion To Vacate at 23.

This argument is unrelated to the Eighth Circuit's reasoning in *Iowa II*, discussed above, and should be rejected for that reason alone. ACS filed the instant motion based on a change in law, *i.e.*, the Eighth Circuit's interpretation of Sec. 251(f)(1) in *Iowa II*. New statutory construction arguments of the sort that ACS now presents to support its request that the Court change the law of the case and reverse its prior ruling assigning the burden of

proof to ACS are too late. ACS should have made that argument to Judge Murphy in 1999.

Furthermore, this new statutory construction argument does not offer a compelling reason for the Court to now interpret Sec. 251(f)(1) differently. The FCC's interpretation of Sec. 251(f)(2) and how it assigns the burden of proof under that subsection is irrelevant to how the Court has interpreted and should interpret Sec. 251(f)(1) in a rural exemption proceeding.

II. THE RCA'S LIMITED REFERENCE TO THE FCC'S UNDUE ECONOMIC BURDEN RULE IS, AT MOST, HARMLESS ERROR

ACS argues, with little explanation, that the RCA's limited reference to the FCC's now vacated undue economic burden rule at 11-12 of the Termination Order undermines the validity of the Order. This reasoning, however, is too superficial and glosses over the RCA's complete rejection of ACS' economic harm arguments at the remand hearing. The RCA summed up its assessment of ACS' presentation at the beginning of its discussion of the issue: "The PTI companies argued that lifting the exemption would be economically burdensome, and GCI successfully discredited that assertion." Termination Order at 9, Exh. 1, attached to GCI Opposition To ACS Motion For Immediate Stay.

In terminating the rural exemption, the RCA's consideration of the economic burden on ACS was, in fact, consistent with the Eighth Circuit's interpretation of the

statutory requirements. The FCC's undue economic burden rule interprets the phrase "unduly economically burdensome" as "undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. §§51.405(c) and (d). The Eighth Circuit vacated this rule out of a concern that, as written, state commissions might fail to consider the full economic burden that rural LECs might suffer by the termination of their exemptions. *Iowa II*, 219 F.3d at 761.

In this case, the RCA did not strike or fail to consider any of ACS' evidence of economic harm at the remand hearing, which included evidence associated with efficient competitive entry. The RCA considered it all but found that the conclusions of ACS' expert on the issue of economic harm were not credible or persuasive. Termination Order at 9, Exh. 1, attached to GCI's Opposition To ACS' Motion For Immediate Stay ("The Commission finds Mr. Smith's conclusions unpersuasive"). The RCA explained at length why Mr. Smith's analysis was flawed and why it preferred the opinions of Dr. Johnson, the Staff Advocacy's expert, and Mr. Hitz, GCI's expert. ACS tries to avoid these facts and ignore the RCA's complete rejection of ACS' flawed economic harm analysis.

On these facts, the RCA fully complied with the Eighth Circuit's interpretation of the statutory requirements under the 1996 Act. ACS has not demonstrated that it has suffered any prejudice that warrants the

immediate vacatur of the RCA's Termination Order. ACS had a full and fair opportunity to persuade the RCA that it would suffer undue economic harm at the remand hearing, but it failed in all respects. The RCA's limited reference to the FCC's now vacated rule is, at most, harmless error. *Tlingit-Haida Elec. Authority v. APUC*, 15 P.3d 754, 762 (Alaska 2001).

III. NEITHER COLLATERAL ESTOPPEL NOR JUDICAL ESTOPPEL AGAINST GCI ARE JUSTIFIED IN THE CIRCUMSTANCES OF THIS CASE

ACS argues for the first time that GCI should be collaterally estopped from arguing "that the burden of proof should be on the ILEC" based on GCI's intervenor status in the *Iowa Utilities Board* litigation. ACS Motion To Vacate at 26-27. The purpose of the collateral estoppel doctrine is to promote judicial economy and preclude parties from relitigating issues that were actually litigated and necessarily decided in a prior proceeding. *Campion v. State*, 876 P.2d 1096, 1098 (Alaska 1994). The Alaska Supreme Court has enunciated a three-part test to determine whether application of the doctrine may be warranted, which ACS correctly recites but incorrectly applies. *See* ACS Motion To Vacate setting forth the correct three-part test.

ACS is wrong when it states that the issues that GCI litigated in the Eighth Circuit are identical to the issues that are now before this Court. The principal issues that ACS raises in its Motion To Vacate are the following:

(1) Whether the Alaska Courts are bound under the Hobbs Act to follow the Eighth Circuit's interpretation of Sec. 251(f)(1);

(2) Whether this Court should depart from its prior law of the case interpretation of Sec. 251(f)(1) in view of the Eighth Circuit's interpretation; and,

(3) Whether the RCA's Termination Order has been rendered invalid in view of the Eighth Circuit's decision to vacate the FCC's undue economic burden rule and the RCA's limited reference to that rule in its Order.

These are not issues that GCI addressed and litigated in the Eighth Circuit. To the contrary, the only issues that the Eighth Circuit addressed, which are not before this Court, concerned the various challenges to the FCC's local competition rules, including its rules regarding the rural exemption. *But see* discussion below regarding GCI's limited ability to present arguments to the Eighth Circuit. The Eighth Circuit's decision does not address the merits of the issues listed above. Given the lack of identity between the issues before this Court and those that were before the Eighth Circuit, the application of collateral estoppel is inappropriate.

Furthermore, application of the collateral estoppel doctrine in the circumstances of this case would not promote judicial economy or avoid relitigation of issues because ACS

has not argued (nor could it) that the RCA is collaterally estopped from defending its Termination Order against ACS' arguments about *Iowa II*. The Court still must decide the issues listed above regardless of whether GCI is collaterally estopped or not. In these circumstances, there is nothing gained by applying collateral estoppel against GCI. If no purpose is served by application of the doctrine, the Court should not apply it. *Tankersley v. Durish*, 855 S.W.2d 241, 247 (Tex. App. 1993).

Furthermore, it would be confusing and unfair to apply the doctrine in this case. Would the Court adopt one holding for the RCA and another for GCI because of the doctrine of collateral estoppel? This situation counsels against application of the doctrine as well. *See* Restatement (Second) of Judgments § 28(2)(b) (providing exception where application of the doctrine would result in inequitable administration of law); *Staten Island Transit Operating Authority v. ICC*, 718 F.2d 533, 542 (2d Cir. 1983) (refusing to apply collateral estoppel where it would apply to one party but not another).

Additionally, there are very strong public interest considerations present in this case that militate against applying the doctrine. It is not a hard and fast rule that the Court must apply regardless of the consequences. Courts have refused to apply collateral estoppel in circumstances where there is a question of law and application of the doctrine would result in an adverse impact on the public

interest and other persons who were not parties to the initial action. Restatement (Second) of Judgments §28(5)(a); *State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 953-54 (Alaska 1995) (acknowledging that an exception to the strict application of collateral estoppel may be appropriate where application of the bar "might foreclose the highest court of the state from performing its function of developing the law" especially on questions of general interest to the public). *See also Consumers Lobby Against Monopoly v. Public Utilities Comm'n*, 603 P.2d 41, 47 (Cal. 1979) (refusing to apply collateral estoppel on question of law if injustice would result or if the public interest requires that relitigation not be foreclosed); *Tankersley v. Durish*, 855 S.W.2d 241, 245 (Tex. App. 1993).

In this case, if the Court were to bar relitigation of the issues ACS has presented and grant the relief that it seeks, members of the public in Juneau and Fairbanks would be denied the benefits of full local exchange competition. Other competitors, like Alaska Fiber Star, which also has an interconnection agreement with ACS for Juneau and Fairbanks, would be precluded from obtaining Sec. 252(c) services and functions from ACS because ACS' rural exemption would be restored. Under these circumstances, the Court should deny ACS' request to apply collateral estoppel because it would harm the public and other persons who were not parties to the Eighth Circuit litigation.

GCI also submits that it did not receive a full and fair opportunity to present its legal arguments to the Eighth Circuit Court of Appeals and that the Court should not apply the bar for this reason as well. *See Chilton-Wren v. Olds*, 1 P.3d 693, 697 (2000) (holding that the precluded party must have had "a fair opportunity procedurally, substantively, and evidentially to contest the issue"). The Eighth Circuit Court of Appeals required all of the Intervenors in support of the FCC rules to submit one consolidated brief. GCI, therefore, was required to participate in consolidated briefing with national telecommunication carriers such as MCI Worldcom, Inc., AT&T Corp., Sprint Corporation and others, which had no interest in submitting arguments on the rural exemption issues. Despite GCI's vigorous attempts to persuade these entities to address the rural exemption issues, they refused. *See* Affidavit of James R. Jackson, Exh. A attached.

As a result, the Joint Brief of Intervenors in Support of FCC, to which GCI was a signatory, did not address the rural exemption issues. *See* Affidavit of James R. Jackson, attached.[10] Under these circumstances, GCI did not have a fair and adequate opportunity to litigate the issues regarding the validity of the FCC's rural exemption rules on the burden of proof and undue economic burden and

[10] The undersigned has not attached the brief because of its length (65 pages), but GCI will make it available to ACS or the Court upon request.

application of collateral estoppel should be denied for that reason as well.

Lastly, at page 28 of its Motion To Vacate, with little explanation, ACS argues that GCI should be judicially estopped because of a sentence that appears in GCI's Petition For Certiorari filed with the U.S. Supreme Court. The allegedly offending statement is that GCI told the U.S. Supreme Court that due to the consolidation of challenges to the FCC's rules in the Eighth Circuit, the decision will not be corrected by other circuits. ACS Motion To Vacate at 28. This statement was true then and is true today. As a result of *Iowa II* and the U.S. Supreme Court's denial of certiorari, the FCC's rural exemption rules are vacated, and no court can reinstate these rules. The Eighth Circuit's decision regarding the validity of the FCC's rules binds all courts under the Hobbs Act. However, as discussed above, in the absence of the FCC's rules, courts are free to interpret the 1996 Act differently than the Eighth Circuit.

GCI has not stated or argued anything different in this case. There is no inconsistency in the legal positions GCI has taken before the U.S. Supreme Court and this Court. ACS argument on this issue should be summarily rejected.

IV. EVEN IF THE COURT WERE TO AGREE WITH ACS' ARGUMENTS, IT IS NOT NECESSARY NOR WOULD IT BE IN THE PUBLIC INTEREST TO VACATE THE RCA'S TERMINATION ORDER

At pages 29-33 of its Motion To Vacate, ACS argues that the Court must immediately vacate its prior burden of proof ruling and the RCA's Termination Order in view of its

legal arguments. Moreover, ACS goes so far as to argue that a remand to the RCA would be unnecessary and the Court simply could revive the former APUC Order deciding not to grant GCI's petition to lift the rural exemption. Additionally, at pages 33-38 of its Motion, ACS alternatively argues that if a remand is ordered, the Court should instruct the RCA to hold a new hearing that would allow the parties to reopen the record entirely and to "vacate or suspend" its interconnection orders.

Assuming the Court is persuaded by ACS' legal arguments and is considering what remedy to grant ACS, GCI respectively submits that ACS' request to vacate would be drastic and the most disruptive to the RCA's efforts to allow full local exchange competition to proceed in Juneau and Fairbanks. The RCA and the parties have expended considerable time and resources to arbitrate the interconnection agreement that ACS now seeks to eviscerate by its request to vacate. *See* Affidavit of Phil Treuer, attached to the RCA's Opposition to ACS' Motion To Vacate. If the Court were to grant ACS' request to vacate, ACS, no doubt, would argue that the interconnection agreement is null and void, and that even if the RCA were to re-affirm the Termination Order on a second remand, GCI would have to negotiate and arbitrate a new agreement. If this were to occur, competition to Juneau and Fairbanks potentially could be delayed for several more years.

If the Court is persuaded by ACS' legal arguments, GCI submits that vacating the RCA's Termination Order is not necessary nor in the public interest. Under Appellate Rule 520, which also applies to administrative appeals by virtue of Appellate Rule 601(c), the Court could stay the effect of the RCA's Termination Order and order the RCA to conduct a prompt remand hearing to be completed within a short time frame. *See, e.g., Jeffries v.* Glacier *State Telephone*, 604 P.2d 4, 8 (1979) (discussing superior court decision to stay proceedings pending the former APUC determination of issues within its primary jurisdiction). In this scenario, the Court should reserve continuing jurisdiction over the case to ensure prompt compliance and to facilitate a quick judicial resolution of the remand decision.

With respect to ACS' suggestion that the Court could simply revive the former APUC order denying GCI's petition to lift the rural exemption. GCI does not believe that there is any basis to revive a decision of the former APUC. This Court reversed the APUC's prior decision and that decision has no further effect. Moreover, the Alaska Legislature abolished the APUC and replaced it with the Commissioners of the RCA. The RCA, not the APUC, is now the relevant agency to make determinations today regarding local exchange competition and the public interest. It is irrelevant what the former APUC Commissioners thought about the matter. The Court should summarily reject ACS' suggestion to revive the former APUC's decision.

CONCLUSION

ACS asks that the Court immediately vacate the RCA's Termination Order and this Court's prior burden of proof ruling based on *Iowa II*. This request follows on the heels of this Court's denial of ACS' motion for an immediate stay, which was based largely on the same legal arguments about *Iowa II* that underlie the present motion. ACS does not offer any more persuasive argument in its new motion that would justify the extreme remedy that it now seeks.

ACS again argues that the Eighth Circuit's interpretation of Sec. 251(f)(1) in *Iowa II* on the burden of proof issue binds this Court and the RCA. This assertion, however, is contrary to the pronouncements of the Alaska Supreme Court, which hold that the Alaska Courts are bound to follow only the U.S. Supreme Court's interpretation of federal law. Moreover, this Court's independent interpretation of Sec. 251(f)(1) in the context of this case does not run afoul of the Eighth Circuit's exclusive jurisdiction under the Hobbs Act to review the validity of the FCC's competition rules. The FCC is not a party to this case, and the Court is not being asked to consider the validity of the FCC rules. To the contrary, for purposes of this appeal, the FCC's rural exemption rules, discussed above, are vacated.

This Court now has twice interpreted Sec. 251(f)(1) differently than the Eighth Circuit. In its remand order, the Court (Judge Murphy) previously interpreted Sec.

251(f)(1) and held that the 1996 Act is silent with respect to which party should bear the burden of proof in a rural exemption proceeding. The Court then ruled as a matter of state law that the burden of proof should lie with ACS in view of its possession and control of the information relevant to the criteria in Sec. 251(f)(1). More recently, in denying ACS' request for an immediate stay, the Court held that the Eighth Circuit's interpretation is "unpersuasive." ACS has not come forward with any compelling reason why the Court should now depart from its prior rulings and follow the Eighth Circuit's remarkable "plain meaning" interpretation of Sec. 251(f)(1).

Furthermore, ACS' argument that the RCA's limited discussion of the FCC's now vacated undue economic burden rule renders the RCA's entire discussion and findings on the issue of undue economic harm invalid is grossly simplistic. ACS overlooks the fact that the RCA considered all of ACS' economic harm arguments but completely rejected them. At the remand hearing, the RCA found all of ACS' economic harm arguments to be unpersuasive. On these facts, the RCA complied with the statutory requirements as interpreted by the Eighth Circuit. Its limited reference to the FCC's now vacated rule is harmless error.

GCI also urges the Court to reject ACS' collateral and judicial estoppel arguments. For the reasons discussed above, the circumstances of this case do not justify application of either doctrine.

GCI urges the Court to deny ACS' request to immediately vacate and allow competition to proceed as contemplated by the 1996 Act and as ordered by the RCA.

Respectfully submitted this 21st day of March 2001.

GENERAL COMMUNICATION CORP.

By: Martin M. Weinstein

Martin M. Weinstein
Regulatory Attorney
ABA No. 9306051

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

TELEPHONE UTILITIES OF ALASKA, INC.; TELEPHONE UTILITIES OF THE NORTHLAND, INC.; and, PTI COMMUNICATIONS OF ALASKA, INC. Appellants, vs. REGULATORY COMMISSION OF ALASKA and STATE OF ALASKA, Appellee, and GENERAL COMMUNICATION CORP. Additional Appellee.	)	Case Nos. 3AN-99-3494 3AN-99-3499 (Consolidated)
GCI COMMUNICATION CORP., Appellant, vs. ALASKA PUBLIC UTILITIES COMMISSION, et al. Appellees.	)	Case Nos. 3AN-98-4759 3AN-98-4903 3AN-98-4905 (Consolidated)

AFFIDAVIT OF JAMES R. JACKSON

STATE OF ALASKA)
) ss:
THIRD JUDICIAL DISTRICT)

I, JAMES R. JACKSON, being duly sworn, deposes and says:

1. I was counsel of record for GCI in *Iowa II*.

2. In the *Iowa II* litigation, the Eighth Circuit Court of Appeals required GCI to participate in

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consolidated briefing with other parties supporting the Federal Communications Commission's ("FCC") various rules under review. The other parties with whom GCI was forced to submit a Joint Brief included MCI Worldcom, Inc., AT&T Corp., Sprint Corporation, and other major national telecommunications entities.

3. The other entities with whom GCI was forced to submit a Joint Brief had very little interest in the "rural exemption" issues that were of concern to GCI, including allocation of the burden of proof and the interpretation of undue economic burden. These entities determined that they would not address the rural exemption issues and would, instead, leave those issues to the FCC to defend. GCI vigorously attempted to persuade those entities to include in the Joint Brief additional arguments regarding the rural exemption, but had no success.

4. As a result, the Joint Brief of Intervenors in Support of FCC, to which GCI was a signatory, does not address the rural exemption issues; it addresses neither the burden of proof nor the interpretation of undue economic burden. GCI has not attached that brief because of its length (65 pages), but GCI will make it available to ACS or the Court upon request.

5. In view of the above, GCI did not have a fair and adequate opportunity to litigate the issues

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regarding the validity of the FCC burden of proof and undue economic burden rules before the Eighth Circuit.

DATED this 21st day of March, 2001.

James R. Jackson

SUBSCRIBED AND SWORN to before me this 21st day of March 2001.

Saundra A. Knox
Notary Public for State of Alaska
My Commission expires:

OFFICIAL SEAL
STATE OF ALASKA
NOTARY PUBLIC
SAUNDRA A. KNOX
My Comm. expires: October 6, 2002

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

TELEPHONE UTILITIES OF ALASKA, INC.; TELEPHONE UTILITIES OF THE NORTHLAND, INC.; and, PTI COMMUNICATIONS OF ALASKA, INC. Appellants, vs. REGULATORY COMMISSION OF ALASKA and STATE OF ALASKA, Appellee, and GENERAL COMMUNICATION CORP. Additional Appellee.	)	Case Nos. 3AN-99-3494 3AN-99-3499 (Consolidated)
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of GCI's Opposition To ACS' Motion To Vacate was hand-delivered on March 21, 2001 to:

Ron Zobel, Counsel for RCA
Office of Attorney General

Tina Grovier, Counsel for ACS
Office of Birch Horton Bittner

Lynn Erwin, Counsel for ACS
Office of ACS

Martin M. Weinstein

Certificate of Service
March 21, 2001

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